DEC 18
MICHAEL RODAK,

No. 80-795
IN THE

Supreme Court of the United States

October Term, 1980

MICHAEL HEFFRON, etc., *et al.*,

Petitioners,

vs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota.

RESPONDENTS' BRIEF IN OPPOSITION.

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Question Presented.

Whether the State of Minnesota may, consistently with the first and fourteenth amendments to the United States Constitution, prohibit all persons, including those required to do so by religious duty, from distributing literature and soliciting contributions in support of political, religious, and other causes on the 125-acre grounds of the annual Minnesota State Fair open to the general public, except upon condition that such activity be limited to the physical confines of a "booth", where the state presented no specific evidence to justify such a restriction.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota.

RESPONDENTS' BRIEF IN OPPOSITION.

Respondents respectfully request that the Court deny the petition for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota filed on August 18, 1980.

Statement of the Case.

On August 24, 1977, respondents, plaintiffs below, International Society for Krishna Consciousness, Inc. [ISKCON] and one of its members, Joseph Beca, filed suit in the Ramsey County, Minnesota, District Court, seeking injunctive relief pursuant to 42 U.S.C. §1983 (1976) with respect to the enforcement of Minnesota State Fair Rule

6.05. The rule was challenged as invalid on its face and as applied under the first and fourteenth amendments to the United States Constitution. The defendants, petitioners in this Court, fair officials and the state attorney general, were charged with prosecuting those who violate the Fair's rules and regulations.

Respondents sought to distribute religious literature and solicit contributions to support their church in the public areas of the Minnesota State Fair [the Fair], but were prohibited from doing so by rule 6.05 which required all persons who engage in such activity to do so only from the confines of a small "booth".[1] The action was determined in the trial court upon cross-motions for summary judgment, based on a stipulation of facts [Stip.] and additional materials filed by the parties.

The parties stipulated that ISKCON is an international religious society which espouses the religious and missionary views of Krishna Consciousness, a monotheistic Hindu sect whose scriptural foundations date back 5000 years. Stip. ¶1-2.[2] ISKCON has been organized as a non-profit religious corporation under Minnesota law for two purposes: to provide an environment suitable for the spiritual life of ISKCON's "devotees", as followers are called, and to dis-

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[1]Minnesota State Fair Rule 6.05 provides:

> Sale or distribution of any merchandise including printed or written material except under a license issued for [*sic*] the Society and/or from a duly licensed location shall be a misdemeanor.

The rule has been interpreted and applied by the Minnesota State Agricultural Society, which operates and manages the Minnesota State Fair, to include all distribution of literature and solicitation of contributions and as restricting all distributors to fixed, Society-assigned booth locations, rented from the Society. See Stipulation of Facts ¶16.

[2]Petitioners assert that "ISKCON claims to be a religious organization. . . ." Petition at 4. This matter, as noted, is not a "claim", but a fact stipulated to by the petitioners.

seminate, as widely as possible, religious truth as it is known to ISKCON members. Stip. ¶¶1, 3.

The "main activity of ISKCON members is preaching Krishna Consciousness". Many go out into public places, distributing ISKCON's publications, receiving no salary for their efforts, and leading an austere life. Stip. ¶5. Going out into public places, to disseminate or sell religious literature and to solicit contributions to support the publishing, religious and educational functions of Krishna Consciousness, is a religious ritual required of ISKCON members, called *sankirtan*.[3] *Sankirtan* is directed to spreading religious belief, to attracting new members, to financing publication of religious literature, and to supporting ISKCON's other religious activities. "Donations and book sales are a principal means of support of this religious movement." Stip. ¶6.

The Fair is conducted annually for 12 days in late August and early September, on approximately 125 acres of land owned by the State of Minnesota. Stip. ¶¶10, 20. The fairgrounds are comprised of permanent buildings, parking lots, and pedestrian and vehicle thoroughfares. The Fair attracts fairgoers from all parts of Minnesota and from other states. During the past five years, the attendance at the annual fair has been about 1,320,000, averaging 115,000 each weekday and 160,000 on weekend days. Stip. ¶¶20-21.

The booth space for exhibitors at the Fair is rented on a first-come, first-served basis; approximately 1400 exhibitors and concessionaires rented space for the 1978 Fair and

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[3]While it is correct that Joseph Beca testified that neither he nor ISKCON would suffer "harm" if confined to a booth, Petition at 4, it is apparent from other questions asked at the deposition that he understood "harm" in the layman's sense of the word, meaning physical harm, rather than as the term of art used by lawyers in injunctive suits. See Deposition of Joseph Beca at 73-75 (Dec. 20, 1977).

approximately 300-500 are rejected annually for lack of space. The denials are based solely on lack of space and do not reflect discrimination for any reason, including religious or political views. Stip. ¶¶17, 18, 22. ISKCON has always been willing to have the activities of its members regulated as they circulate throughout the fairgrounds, but has urged consistently that its activities may not appropriately be confined to a booth. Stip. ¶ 23.

In addition to the stipulated facts, the parties presented affidavits in support of their motions for summary judgment. Petitioner Michael Heffron, Secretary and Manager of the Agriculture Society, reported many of the same facts concerning geography and attendance that were recited in the stipulation. In addition, he noted that 234 complaints had been received by the Fair allegedly related to the activities of Krishna Consciousness devotees during the 1977 fair. The complaints themselves were unsworn, and apparently accepted with no attempt at verification or investigation by the Fair. Four affidavits, reciting complaints gathered at the 1977 Fair, were also attached to the Fair's motion. Respondents in turn submitted affidavits indicating that the Fair solicited complaints and describing the process by which ISKCON educated its members about proper solicitation and distribution techniques.

Within a few days after the suit was filed, the district court issued a temporary restraining order permitting respondents to engage in their proposed activities at the 1977 fair. Subsequently, in 1978, respondents moved for summary judgment, seeking permanent injunctive relief similar in scope to that previously granted. Petitioners filed a cross-motion for summary judgment. On August 18, 1978, the district court issued an order and memorandum, granting petitioners' motion for summary judgment and denying respondents' motion. Petition at A-19 to A-22.

Respondents appealed to the Minnesota Supreme Court. By opinion filed August 18, 1980, Petition at A-1 to A-18, that court, sitting en banc, reversed the order of the district court and remanded with directions "to enjoin defendants from enforcing Rule 6.05 against members of ISKCON who wish to practice Sankirtan at the state fair." *Id.* at A-11 (footnote omitted). Three justices filed a partial dissent. *Id.* at A-11 to A-18.

Summary of the Argument Why the Writ Should Be Denied.

1. The decision of the Minnesota Supreme Court does not conflict with any decision of any other state court of last resort or any federal court of appeals. In fact, three other decisions of such courts have, on indistinguishable facts, reached precisely the same result as did the court below.

2. The decision of the Minnesota Supreme Court did not decide any important questions of federal law which should be settled by this Court, nor does it conflict with any applicable decision of this Court.

Rather, the court below correctly applied the teachings of this Court relating to the validity of time, place, and manner restrictions upon the exercise of first amendment-protected rights as articulated in such cases as *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Carefully following these principles, the state supreme court weighed the governmental interests against the Fair rule's infringement of expression, finding that the asserted governmental concerns were unsupported by the evidence; that, even to the extent they might be supported, the justifications for the rule were

not substantial or compelling; and that obvious, less-restrictive alternatives were available to the Minnesota Fair which would have been far more narrowly tailored to the governmental interests.

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI.

I.

The Decision Below Does Not Conflict With Any Appellate Decision and Is in Fact Supported by Three Other Such Decisions Directly on Point.

The first ground upon which petitioners seek the issuance of a writ of certiorari is that the decision of the Minnesota Supreme Court "is contrary to recent decisions of several other courts." Petition at 6. By so doing, the petitioners appear to attempt to bring the matter within the criteria of Sup. Ct. R. 17.1(b). There is, however, no case to be made under that rule. Each of the allegedly conflicting decisions involving state fairs[4] was rendered by a federal district court. Moreover, not only is there no conflicting appellate decision on point, but there are in fact three decisions, apart from the present one, of federal courts of appeals and a state court of last resort which reached precisely the same conclusion on the same question as did the Minnesota Supreme Court here. *Edwards v. Maryland State Fair and Agricultural Society*, 628 F.2d 282 (4th Cir. 1980), *rev'g* 476 F.Supp. 153 (D. Md. 1979) (Maryland State Fair); *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir. 1979), *aff'g* 456 F.Supp. 437 (S.D. Ind. 1978), *cert. denied*, 444 U.S. 963 (1979) (Indiana State Fair), *International Society for Krishna Consciousness v. Colo-*

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[4] *International Soc'y for Krishna Consciousness v. Barber*, No. 77-CV-328 (N.D.N.Y. Aug. 25, 1980); *Hynes v. Metropolitan Gov't*, 478 F.Supp. 9 (M.D. Tenn. 1979); *International Soc'y for Krishna Consciousness v. Evans*, 440 F.Supp. 414 (S.D. Ohio 1977). See Petition at 6.

rado State Fair and Industrial Exposition Commission, 610 P.2d 486 (Colo. 1980) (Colorado State Fair).[5]

This Court has already declined to review the Seventh Circuit's decision upon the issue presented here and, as has been seen, since that time, the Fourth Circuit and the supreme courts of Colorado and Minnesota have squarely agreed with the decision of the Seventh Circuit. If certiorari was inappropriate in *Bowen, supra*, the ensuing appellate unanimity on the question would surely appear to make review even less apt now.

Petitioners essay at distinguishing *Bowen, supra*, by asserting that "unlike the instant case, the record in the Indiana case suggested that Krishna members had been singled out for punishment, criminal prosecution and harassment." Petition at 7 n.1. The reference, evidently, is to a finding of the district court in *Bowen* that plaintiffs there were taken into custody and threatened with arrest should they have persisted in violating the Indiana State Fair's "booth rule", 456 F.Supp. at 440 (finding no. 10), a rule the substantive content of which was identical to that of the Minnesota State Fair. However, not only did the district court, and certainly the Seventh Circuit, in *Bowen* not rely on this fact, but it is apparent that the petitioners read the finding itself for far more than it is worth. For the *Bowen* district court also specifically found that

> [d]efendants herein, by their policy and resolution [the "booth rule"] are attempting to treat plaintiffs like every other organization coming upon the Indiana State

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[5]Of these three cases, petitioners cite only one, *Bowen, supra*, Petition at 7 n.1, even though the decision below itself cited the Colorado Supreme Court decision referring to it as "a case virtually identical on its facts to this case" and one which "reached the same result as we reach here." Petition at A-11, n.11. The third appellate decision, the Fourth Circuit's in *Edwards, supra*, was filed six days prior to that of the Minnesota Supreme Court of which review is here sought.

> Fairgrounds for the purpose of selling or exhibiting their wares, products, merchandise and philosophy.

International Society for Krishna Consciousness v. Bowen, supra, 456 F.Supp. at 441 (finding no. 18). In context, therefore, it is clear that the actions of the Indiana State Fair to which petitioners refer did not "single[] out" the plaintiffs, but rather were merely part and parcel of the Fair's across-the-board enforcement program of its rule. The simple fact is that *Bowen* is, as the Fourth Circuit stated in another identical situation in *Edwards,* "indistinguishable".[6] *Edwards v. Maryland State Fair and Agricultural Society, supra,* 628 F.2d at 286.

The truly distinguishable decision, rather, is the only appellate decision cited by petitioners upon the ground of conflicting decisions, *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979). There, the district court denied plaintiffs' motion for a preliminary injunction against enforcement of an Atlanta, Georgia, ordinance applicable at the city's airport terminal, and the denial was affirmed in part and reversed in part by the Fifth Circuit. One provision of the Atlanta ordinance was facially similar to the Minnesota fair rule at issue in the present case.

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[6]Petitioners also imply that *Bowen* may be distinguished from this case upon the ground that, while violation of the Indiana State Fair's booth rule apparently could have resulted in arrest, "the only remedy used against persons who violate the Minnesota State Fair's rule is expulsion from the fairgrounds." Petition at 7 n.1. Apart from ipse dixit, however, petitioners utterly fail even remotely to demonstrate how any such alleged differences in methods of enforcement, as opposed to substantive content, of the Indiana and Minnesota rules can possibly affect resolution of the merits of the two cases. In both situations, precisely the same restrictions on precisely the same first amendment rights were imposed. Whether by arrest or expulsion, the rules prevented the plaintiffs from engaging in their required religious exercise of *sankirtan.*

Under the ordinance in *Eaves*, although literature distribution, proselytization, and even the solicitation of donations were permitted to take place at large in the airport lobby, if such a solicitation occurred, and if a person decided to make a donation, the forwarding of the funds could only take place at a previously designated "solicitation booth". *Id.* at 836, 837-38. The Fifth Circuit affirmed the denial of the motion for preliminary injunction insofar as this provision was concerned. *Id.* at 826-30.

Several rather obvious considerations compel the conclusion that *Eaves* and the decision below in this case are not in conflict for certiorari purposes. For one, the *Eaves* decision is inherently not a final one. The ordinance there, unlike the situation here, was considered only in an interlocutory stage. This distinction is critical for two reasons. First, the respective burdens of persuasion are notably different. Since the district court in *Eaves* had denied the preliminary injunction motion, the Fifth Circuit necessarily reviewed that decision only on an abuse of discretion standard and indeed explicitly noted as much. *Id.* at 828. Moreover, since plaintiffs there had not gone beyond a request for interlocutory relief, a more stringent showing on their part was necessary than would have otherwise been the case.

> But in this case appellants were asking for a preliminary injunction; that makes it more difficult for them to obtain relief against the solicitation booth provisions. *See, e.g., Compact Van Equipment Co. v. Leggett & Platt Inc.*, 566 F.2d 952, 954 (5th Cir. 1978).

Id.

Second, the *Eaves* court noted that, upon remand, it would be entirely open to plaintiffs to present evidence which would require invalidation of the ordinance. *Id.* at 830. Up to that point, they had chosen not to do so, and had only "attack[ed] [the] restriction on its face. . . ." *Id.*

at 826. Thus, only if such a procedure were to take place, and only if the ordinance were to be finally upheld by the Fifth Circuit, would a conflict even arguably be created. At the present tentative interlocutory stage of the *Eaves* case, there is no true conflict ripe for resolution by this Court. No necessity has yet appeared so as to require the exercise of this Court's power of review.

In any event, the substantive scope of the Atlanta ordinance is markedly different from that of the Minnesota rule here considered. The Atlanta restriction at issue in *Eaves* permitted the dissemination of literature and the solicitation of donations throughout the Atlanta airport lobby and restricted to a "booth" only the physical transfer of money. Finding that the Atlanta ordinance applied only to the "mechanical, non-communicative aspects of transferring money," the court found that the regulations faced a lower first amendment hurdle. *Id.* at 828. Here, to the contrary, the Minnesota enactment applies broadly to the clearly protected activities of solicitations and distribution of materials, including literature, Petition at 3, neither of which was even implicated by the *Eaves* ordinance.

Moreover, the places to which the respective regulations apply are entirely different. Both law and common sense dictate this difference as an important distinguishing feature. As the *Eaves* court noted

> [i]n an airport — unlike a park, for example — "free movements" are likely to be almost as regular and predictable as those of people entering and leaving a building.

Id. at 831.

By contrast,

> [a]s has been aptly said, a "fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic and intellectual."

> *ISKCON v. State Fair*, 461 F.Supp. 719, 721 (N.D. Tex. 1978). Tidiness and tranquility are not qualities ordinarily found at fairs. . . .

Edwards v. Maryland State Fair and Agricultural Society, supra, 628 F.2d at 286.

For first amendment purposes, therefore, the interior of an airport lobby is not truly comparable to a state fair which sprawls over some 125 acres; the latter is, indeed larger than many parks, and fulfills functions quite distinct from those of an airport. As this Court has emphasized,

> [t]he nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

That the "nature" of airports and state fairgrounds and the "pattern of [their] normal activities" differ greatly from each other should go without saying. The Minnesota Supreme Court recognized precisely this point when, citing *Eaves*, it observed that "[t]he state fair is not . . . equivalent

to an airport," Petition at A-10 n.10.[7] Hence, under settled

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[7]For the same reason, the other district court decisions cited by petitioners, *United States v. Boesewetter*, 463 F.Supp. 370 (D.D.C. 1978) (Kennedy Center lobby) and *International Soc'y for Krishna Consciousness v. McAvey*, 450 F.Supp. 1265 (S.D.N.Y. 1978) (World Trade Center) also do not support the proposition they attempt to reach. Indeed, the Minnesota Supreme Court itself used *McAvey* as illustrative of "[a] place regulation less restrictive than Rule 6.05" which "might . . . be appropriate." Petition at A-9. But the court cautioned that the *McAvey* regulations, which were dissimilar to the Minnesota rule, were

> offered . . . only as an example. We do not intend to suggest that the same regulations would be appropriate at the Minnesota State fair. Regulations of the time, place, and manner of protected activity must be tailored to the forum in which such activity takes place. The state fair is not equivalent in character to the World Trade Center.

Id. at A-10 n.10.

In *McAvey*, moreover, the defendants proved by extensive expert testimony that compelling interests required the specific limitations on speech in interior areas of the World Trade Center complex, at least sufficiently to permit the court to deny a preliminary injunction against enforcement of the regulations, particularly in view of the fact that they permitted the plaintiffs to engage in peripatetic speech activities in many other areas of the facility. None of these factors are present here: no expert testimony of the kind involved in *McAvey* was adduced; the case concerned a final, not a preliminary, injunction; and the rule at issue permits "roving" activity nowhere at the fair.

Nor could *Boesewetter*, *supra*, even arguably create a conflict, even were it an appropriate decision for rule 17.1(b) purposes. That decision was expressly "limited . . . to the narrow question of the constitutionality" of a federal regulation which prohibited the sale or distribution of newspapers, leaflets, and pamphlets in the interior of the Kennedy Center. 463 F.Supp. at 373. The court held that such an "absolute ban" was impermissible. *Id.* It only then suggested, citing *International Soc'y for Krishna Consciousness v. Evans*, 440 F.Supp. 414, 424 (S.D. Ohio 1977), see *supra* note 4, that, under certain conditions, "distribution of religious literature perhaps may be limited" to "sales booths". 463 F.Supp. at 373. The court immediately recognized, however, that such a regulation had been rejected in a case involving the Pittsburgh airport. *International Soc'y for Krishna Consciousness v. Griffin*, 437 F.Supp. 666, 673 (W.D. Pa. 1977).

Thus, not only is the dissimilarity of the Kennedy Center lobby to the Minnesota State Fair grounds immediately obvious, but the *Boesewetter* district court's booth suggestion was made in only the most tentative possible dictum. Certainly on this basis no conflict can arise.

principles, no apt constitutional comparison is possible.[8]

II.

The Decision Below Correctly Applied "Time, Place, and Manner" Principles Long Settled by This Court.

Petitioners also apparently contend that the federal question decided by the Minnesota Supreme Court was so inherently important as to require that certiorari be granted, or that the decision conflicts with previous decisions of this Court. Sup.Ct.R. 17.1(c). Examination of the decision, however, rather quickly reveals that neither of these criteria calls for allowance of the writ in this case. The state supreme court here simply acted pursuant to well-established principles of law relating to restrictions on the time, place, and manner of the exercise of first amendment-protected rights.[9]

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[8]Further, the evidence in *Eaves* at the hearing of the preliminary injunction consisted of the uncontroverted affidavit of the airport manager, who specifically pointed to serious problems caused by the mechanical exchange of money. *Id.* at 829. Explicitly noting the appellants' opportunity to challenge the affidavit at trial, the court even went so far as to suggest the direction the rebuttal might take. However, given the state of the evidence and the deference to be accorded the trial court's denial of a preliminary injunction, the booth limitation was upheld. *Id.* at 829-30.

The evidence presented in *Eaves*, the affidavit of the airport manager, focused on the disruption caused by exchange of money and the regulation sustained addressed only that activity. In the present case, the record is devoid of any such specific evidence. Rather, the fair manager referred in only the most conclusory terms to "[t]he congested conditions on the enclosed fairgrounds during the annual State Fair," Affidavit of Michael Heffron at 2, ¶7, and engaged in insubstantial speculation unrelated to the facts of the case as to the effects of the claimed congestion. *Id.* at 5, ¶18. Here, as in *Edwards*, "[o]n this record, crowd control and the state's interest in public safety are not shown to compel the rule." *Edwards v. Maryland State Fair and Agricultural Soc'y, supra*, 628 F.2d at 286.

[9]Both the solicitation of contributions, *see, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (charitable solicitations); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious solicitations), and the distribution of literature, *see, e.g., Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938), are activities protected by the first amendment.

It correctly held that the Minnesota State Fair rule which required that all solicitations and distribution of literature at the Fair be limited to the physical confines of a "booth" was inconsistent with those principles. The court below found that the evidence, or lack thereof, adduced by the Fair in support of its rule provided insufficient justification for the broad restriction it imposed. The petitioners would have this Court reweigh the evidence somehow to produce the opposite result. Such an exercise is entirely unnecessary.

The general framework for the first amendment analysis of restrictions on speech such as that of the Minnesota State Fair at issue here was synthesized in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Although "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted," *id.* at 115 (footnotes omitted), the concept of "reasonableness" takes on a special coloration in this context.

> Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legislative interest. Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . ." Free expression "must not, in the guise of regulation, be abridged or denied."

Id. at 116-17 (footnote omitted) (bracketed material and ellipses in the original). Thus, the state

> may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . . "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ."

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980) (citations omitted) (internal ellipsis in the original), *quoting NAACP v. Button*, 371 U.S. 415, 438 (1963). To be valid, a "time, place, and manner" restriction must therefore be "narrowly tailored to further [the state's] compelling interests." *Grayned v. City of Rockford, supra*, 408 U.S. at 119. Viewed in this light, Minnesota's booth rule is seen indeed to be "an impermissibly broad prophylactic. . . ." *Id.*

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969). The booth rule is not tailored, as was, for example, the school anti-noise ordinance in *Grayned, supra*, or the judicial obstruction statute in *Cox v. Louisiana*, 379 U.S. 559 (1965), to interdict activities which disrupt or interfere. It is, instead, an across-the-board restriction on protected speech applicable whether or not there is plausible reason to believe that legitimate state interests are cognizably threatened.

In particular, the Minnesota Supreme Court, upon examination of the record, concluded that the interests under

the rubric of which the state seeks to justify the rule were insufficient. Petitioners present no reason for that judgment to be further reviewed, much less overturned, by this Court. Not only do they employ the wrong equation in balancing the interests at stake, but they define the state interests far too broadly and abstractly and weigh them against respondents' individual interests instead of against the first amendment interest in providing maximum opportunities for expression. Moreover, in balancing the interests, petitioners ignore the requirement that less restrictive alternative regulations must be adopted if available, undoubtedly because such alternatives are not only obvious in the present case, but were proposed by the petitioners themselves.

At the outset, it should be noted that respondents have never sought by this action to carve out a special exception for themselves and obtain special privileges unavailable to others. Instead they have urged that rule 6.05 is overly restrictive of political and religious speech because the fairgrounds could easily accommodate not only individuals speaking from fixed locations, but also people moving from place to place. Respondents have not suggested that such activities cannot be regulated, perhaps by limiting the total number of persons who might be involved, much as there is now a limit on the number of booths which can be accommodated at the Fair. Petition at A-9 n.9.

The interests asserted by petitioners include (1) minimizing congestion; (2) providing a fair and neutral rule; (3) preventing unwanted communication; and (4) preventing misconduct and fraud. All of these were argued to the Minnesota Supreme Court and found wanting.

(1) *Minimizing Congestion*. Although petitioners refer to the need to reduce congestion, and the possible dangers which might conceivably result from overly congested fairgrounds, there is simply no evidence that activity of the

kind proposed by respondents would measurably affect pedestrian traffic at the Fair. On the contrary, because petitioner can point to nothing in the record to establish that increased congestion or dangerous conditions resulted from respondents' activities at the 1977 Fair, they rely instead on vague generalizations and abstract statements. See Petition at 14. The rule cannot be justified upon such speculation. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). The result reached by the Minnesota Supreme Court is entirely in accordance with the rejection by the Fourth and Seventh Circuits of the same argument in indistinguishable circumstances. *Edwards v. Maryland State Fair and Agricultural Society*, 628 F.2d 272, 286 (4th Cir. 1980); *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 669 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979). Certainly the mere recitation of attendance figures and areas, see Petition at 12-13, does not prove petitioners' point.

Petitioners' argument from favoritism, see *id.* at 15, must, as noted, also be rejected. It borders, indeed, on the frivolous to assert that the fact that a successful challenge by one group to a broad restriction upon expressive activity is to be viewed as a "request for special dispensation." The cases cited by petitioners, *Fowler v. Rhode Island*, 345 U.S. 67 (1953) and *Niemotko v. Maryland*, 340 U.S. 268 (1951), only serve to underscore the futility of their argument.

Petitioners also fail to recognize the existence and significance of alternatives less restrictive than the general confinement of expression at the Fair to a booth. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939). Indeed, in the trial court, the

petitioners themselves suggested several alternatives, including a limitation on the number of individuals who might engage in expression like that proposed by respondents and more carefully drawn area restrictions, which would amply satisfy any legitimate state interest. Defendants' Memorandum in Support of Cross Motion for Summary Judgment at 14-15, *International Society for Krishna Consciousness v. Heffron*, No. 421843 (Minn. Dist. Ct. Aug. 18, 1978), *rev'd*, No. 49526 (Minn. Aug. 18, 1980). Moreover, the Fair's willing acquiescence in the policy allowing oral expression (except for solicitation), but not dissemination of printed material, belies any claim that the booth restriction is justiifed because of congestion. Congestion is no more likely to be caused by leafletting or soliciting that it is by oral advocacy, as the court below recognized. Petition at A-7 to A-8.

(2) *Inherent Fairness of Rule*. Petitioners next argue that "[t]he difficulties of providing traditional police power protection by the State Fair would, of course, be greatly magnified if all religious, political and press organizations were permitted to solicit money and distribute materials randomly on the fairgrounds." Petition at 17. They claim that the across-the-board booth rule is "[t]he most reasonable, the most fair, the most neutral, the most ordered manner by which . . . competing interests can be accommodated." *Id.*

The fallacy of these contentions was well stated recently by Judge Winter, speaking in the virtually identical case regarding the Maryland State Fair.

> Tidiness and tranquility are not qualities ordinarily found at fairs, nor are they qualities enshrined in the First Amendment. If others undertake to exercise First Amendment rights at the Maryland State Fair, well and good. The state retains the right to protect substantial

> state interests by the least restrictive effective regulation, and if the exercise of constitutional rights either by plaintiffs or others who may come upon the scene endanger state interests, defendants are not without authority to act. In short, we decided this case strictly on the record before us, and we decline to speculate as to abuses which may occur in the future.

Edwards v. Maryland State Fair and Agricultural Society, 628 F.2d 282, 286-87 (4th Cir. 1980).

As noted, one such alternative was suggested below by the petitioners themselves and stated by the court. "If the number of persons distributing and selling religious literature and receiving donations throughout the public areas of the fairground becomes unmanageably large, a regulation to limit their members might be justified." Petition at A-9 (footnote omitted). Such a system, if indeed some predicate therefor not now appearing were shown to exist, would have all the virtues of fairness and neutrality which petitioners extol, while at the same time maximizing the opportunities for speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976). The rule the invalidity of which was perceived by the Minnesota Supreme Court impermissibly places unnecessary restrictions on the communication of ideas to willing listeners. If cannot be justified by the paternalistic and myopic view advanced by petitioners.[10]

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[10]Petitioners also complain of the Minnesota Supreme Court's finding that "[i]f Sankirtan is to be practiced properly, the various activities included in the practice of Sankirtan must be performed in a peripatetic manner." Petition at A-7 n.7. See Petition at 16. The assertion is at best a straw man, however, since the finding was stated only in dictum. Petitioners can hardly expect, in any event, that a grant of certiorari is justified to reverse a finding that the state supreme court noted, and quite correctly so, was "easily inferrable from the record." Petition at A-7 n.7.

Moreover, the argument that petitioners seek to extrude from the finding, that other persons may also seek to engage in peripatetic expressive activity, is not only without support in the record, but does not logically relate to the premise.

(3) *Prevention of Unwanted Communication.* Petitioners further argue that the booth rule is essential to the prevention of unwanted communication of ideas to fairgoers. Petition at 18-20.

There is, however, no generalized "right of privacy" to be free from being approached by others in public places. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980). Thus, while it cannot be gainsaid that government may permissibly regulate expression to serve privacy interests when the speaker invades the sanctity of the home, *see, e.g., Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970) (mailing into home against previously expressed desire of householder), or in situations where the audience may properly be characterized as "captive", *see, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (passengers on city buses), the analogous governmental interest in open public places, such as a fair, is attenuated at best. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) ("the right of privacy" was "not shown" where there was no attempt "to stop the flow of information into [one's] own household, but to the public.") The court below correctly applied these principles. Petition at A-8 n.8.

In a place such as a state fair, as in a park or on a street, the "unwilling listener" problem generally does not exist, for a person in potentially such a position is fully capable simply of saying "no" to the prospective speaker and continuing on his way. *See Spence v. Washington*, 418 U.S. 405, 412 (1974) (per curiam) (public display of possibly offensive altered American flag); *Cohen v. California*, 403 U.S. 15, 21 (1971) (wearing in courthouse of jacket bearing offensive slogan).

Generally, as Justice Harlan stated,

> [t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Id.

The present record is devoid of anything even approaching such a rigorous showing and the burden of demonstrating the existence of "essential intolerability" is especially heavy where public places are concerned, "for example, [in a] stroll[ ] through Central Park." *Id.*

The petitioners admit that "patrons have the freedom to reject any Krishna solicitation and walk away . . . ." Petition at 19. This alone should defeat their claim. *See Edwards v. Maryland State Fair and Agricultural Society*, 628 F.2d 282, 286 (4th Cir. 1980) ("[A] person present [at a state fair] is fully capable of refusing any solicitation and continuing on his way.") Their assertion that "the only certain means that patrons have for avoiding repeated solicitations by the same or other ISKCON members as they roam the fairgrounds would be to leave the fair itself," Petition at 19-20, does not alter the result. There is nothing in the record to demonstrate the existence of such a dichotomy. Absent such a showing it cannot be assumed that the open grounds of a state fair are anything quite like the straitjacket petitioners unconvincingly portray. Moreover, the play required by the first amendment is antithetical to the notion of "certainty" that the state proposes. *See Cohen v. California, supra.*

Moreover, in this area, as in other first amendment contexts, even where a showing of potential endangerment of privacy has been made, but where a less restrictive means of protecting the interest exists, the state may not choose a broader restriction that would unnecessarily restrict the

exercise of first amendment rights. Indeed this Court has shown that such analysis is required even where the *sanctum sanctorum* of the home is involved. *See Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door canvassing unconstitutional where city could have prohibited such canvassing only after the householder previously indicated a wish not be be disturbed). *Compare Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965) *with Rowan v. United States Post Office Department, supra* (statute which placed burden on recipient to request delivery of certain mail unconstitutional, but one which permitted recipient affirmatively to stop delivery upheld).

In the present case, less restrictive alternatives which would enable the state to serve its cognizable interests in this area are readily available. For example, if the Fair appropriately determines that persons in a queue or those seated at performances constitute a "captive audience", approach of such persons by speakers might be specifically prohibited. *See International Society for Krishna Consciousness v. Bowen*, 456 F.Supp. 437, 445 (S.D. Ind. 1978), *aff'd*, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979) (similar requirement imposed by uncontested condition on injunction against operation of booth rule). As noted, however, no analogous state interest exists with respect to fair patrons at large and mobile on the fairgrounds. In such cases, the "right of privacy" cannot serve as a mechanism greatly to restrict the ability of speakers to communicate with willing listeners.

(4) *Prevention of Misconduct*. Finally, it is said that the booth rule is necessary to prevent "deceptions, fraud and other misconduct", of which petitioners claim there is "uncontroverted evidence". Petition at 20.

First, the only such "evidence" which was even arguably properly before the Minnesota courts on this issue consists of the sworn affidavits to which petitioners refer.[11] *Id.* at 21.[12] The other allegations made by these un-cross-examined affiants were given no weight either by the trial court or the state supreme court, and this Court is not the proper forum for the credibility of such "evidence" to be redetermined. It is established, in any event, that particular instances of misconduct cannot serve as the predicate for a restraint which would abridge the first amendment rights of all. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931). *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975). Thus the federal courts of appeals to which the same argument has been presented have correctly rejected it. *Edwards v. Maryland State Fair and Agricultural Society*, 628 F.2d 282, 285-86 n.2 (4th Cir. 1980). *See International Society for Krishna Consciousness v.*

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[11]Petitioners are incorrect in claiming that the evidence of complaints was unrebutted. The affidavits filed by the Fair were not based, for the most part, on first-hand observations. Only four complaints were presented by means of affidavit, recounting the experiences of members of the public attending the Fair. Elizabeth Ann Murphy reported that a contribution was demanded for a hard-bound book, as did William Paddock. Michael Gene Krogness related that he was approached by a person he believed to be a member of ISKCON who represented that he was with a state agency. Glenn Larson complained that he was called names after declining to make a contribution.

The complaints were counterbalanced with affidavits of David Ewert, who reported that he encountered individuals engaged in an effort to provoke complaints against ISKCON devotees, and affidavits of Joseph Beca and Thomas Kerr, describing the methods they, as ISKCON devotees, used in soliciting Fair patrons.

[12]Petitioners cannot seriously expect this Court to consider the "unsworn complaints", Petition at 20, referred to by the fair manager or any factual matters in another, wholly different, action, *International Soc'y for Krishna Consciousness v. Barber*, No. 77-CV-328 (N.D.N.Y. Aug. 25, 1980), which was decided after the opinion of the Minnesota Supreme Court was filed and to which no factual relationship to the present case was asserted below or is now shown. Respondents object to petitioners' attempt to use these obviously inapplicable matters.

Bowen, 600 F.2d 667, 669 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979).

Also long established is the rule that a far less intrusive and restrictive method is available by which the state interest at issue may be served. "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). *Accord, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).

Without acknowledging its source, petitioners recognize the existence of the principle, but implicitly invite this Court to repudiate it. Petition at 22. Here, too, the federal appellate courts have held that the prospect of fraud or misrepresentation is insufficient to justify the broad booth rule in the state fair context. *Edwards, supra*, 628 F.2d at 286; *Bowen, supra*, 600 F.2d at 669-70.[13]

Decrying the criminal remedy as "too simplistic and impractical", petitioners assert that imposition of a booth would make the state's job "unquestionably much easier. . . ." Petition at 22.

However, it is beyond doubt that the state may require a person, "before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell v. Connecticut, supra*, 310 U.S. at 296; *accord, Hynes v. Mayor of Oradell*, 425 U.S. 610, 618-19 (1976); *Martin v. City of Struthers*, 319 U.S. 141, 148 n.14 (1943). A provision of this kind should be sufficient to enable the state

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[13]The correctness of the district court's holding in *Barber, supra* note 22, to which petitioners refer, Petition at 23, is thus open to very serious question. In any event, no record of the kind relied upon by the *Barber* court exists here.

to enforce the penal laws in this area. But "[i]f it is said that these means are less efficient and convenient" than is the booth rule for this purpose, "the answer is that considerations of this sort do not empower a [state] to abridge freedom of speech and press." *Cf. Schneider v. New Jersey, supra,* 308 U.S. at 164 (discretionary permit issuance). Therefore, "the ease of administering the 'booth rule' . . . [is not a] consideration[ ] which save[s] the rule." *Edwards, supra,* 628 F.2d at 287. For the state simply to speculate that an overbroad restriction may aid in penalizing the few who may violate penal laws does not support its general imposition.

Conclusion.

For these reasons, the petition for a writ of certiorari should be denied.

DATED: December 18, 1980.

Respectfully submitted,

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